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November 21, 2005

VIA FACSIMILE AND FIRST CLASS MAIL

Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5555

Dear Mr. Jordan:

The undersigned represents Entercom Seattle, LLC (d/b/a KIRO-AM) in the above-referenced MUR. Entercom Seattle, LLC is a wholly owned subsidiary of Entercom Radio, LLC, which is in turn is a wholly owned subsidiary of by Entercom Communications Corp., a Pennsylvania corporation with a principal place of business at 401 City Avenue, Suite 809, Bala Cynwyd, Pennsylvania 19004 (hereinafter referred to collectively as "Entercom"). This matter has been generated through a complaint filed with the Commission by the Washington State Republican Party ("WSRP"). In its complaint, the WSRP alleges that Entercom has violated 2 U.S.C. § 441b by permitting Dave Ross, a long time radio talk show host to remain on the air during a period in which Mr. Ross was a declared candidate for federal office.¹ The complaint further alleges violations of the Federal Communications Act which are outside the jurisdiction of the Commission and will not be addressed by this response.

As a threshold matter our clients believe this complaint should be dismissed solely due to the Commission's failure to forward the complaint to it in a timely manner. The Federal Election Campaign Act ("Act") requires the Commission to forward a

¹ The complaint also alleges that Mr. Ross and KIRO engaged in "illegal corporate coordination" but does not explain how such coordination is in violation of the Federal Election Campaign Act. Our response does not specifically address this coordination allegation as it is not necessary that the Commission separately analyze the coordination issue to dismiss this complaint. See MURs 5540 and 5545.

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complaint against which a violation has been alleged within five days after receipt. 2 U.S.C. § 437g(a)(1). In this case, the Commission did not forward the complaint until one year after the complaint was received. This oversight has unduly prejudiced Entercom and has made it very difficult to properly prepare a factual response to the complaint. Nevertheless, even if the facts of the complaint are taken as true, the complaint fails to properly allege a violation of the Act and should be dismissed on the merits.

FACTUAL BACKGROUND

By way of factual background, Dave Ross has been a member of the KIRO staff since 1978. From 1978 through 1987, Mr. Ross served on the news staff of KIRO initially as a reporter and ultimately as news anchor. In September 1987, Mr. Ross became the host of the Dave Ross show that aired consistently since that date until Mr. Ross temporarily left the air on July 23, 2004 to run for Congress. Mr. Ross resumed as host of his show shortly after his unsuccessful bid for Congress in November 2004.

The format of the Dave Ross show has been consistent from its onset. The show broadcasts five days a week for three hours per day. The show features Mr. Ross as he discusses news, current events, politics as well as a host of other issues. As stated above, KIRO is an affiliate of CBS News and carries content supplied by CBS news under that arrangement. In addition to his show, Mr. Ross provides short commentaries on issues of the day which is carried nationwide by approximately 240 stations.

The pertinent facts in this matter are as follows:

- (1) On or about May 20, 2004, Dave Ross apparently publicly announced on KIRO that he intended to become a candidate for federal office in response to a direct question asked of him on-air by his co-worker Jane Shannon (morning news anchor and emcee of the on-air event during which this statement occurred) regarding "rumors" she had heard. This announcement was made without the prior knowledge of, or approval of Entercom or KIRO staff. It is Entercom's understanding that, at the time of this announcement, Mr. Ross had not yet begun to raise any funds for his campaign, and was not yet a "candidate" as defined by the Act. Nevertheless, this announcement was made during an on-the-spot news forum entitled "Battle of the Talk Show Hosts."
- (2) A poll question was posted on the KIRO website on or about May 20, 2004 asking whether Dave Ross should run for Congress. Entercom believes that this website poll was removed within hours of Dave Ross's announcement on May 20, 2005. The specific circumstances surrounding the posting on the website and its removal are difficult to confirm given the amount of time that has past and changes in KIRO staff since that time. However, once the KIRO management learned that the information was posted on the website it ordered immediate removal of links and references to Mr. Ross' announcement. As a general matter, the KIRO website, www.kiro.com, is a companion to the radio station's news and

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commentary functions. Thus, the website provides daily news and commentary that complements the content of its radio shows.

- (3) Upon his announcement for office, Mr. Ross continued to host his show until July 23, 2004, the day he became a legally qualified candidate for office. Throughout Mr. Ross' campaign for Congress, Entercom was sensitive to its role in the community as a news organization. It did not want to be perceived as promoting the campaign and took several steps to ensure the neutrality of KIRO throughout the campaign. To that end, KIRO issued verbal instructions to Mr. Ross and other on-air personalities regarding their ability to discuss his candidacy on the air. These instructions included:

- a) Mr. Ross was prohibited from "electioneering" on his show. Furthermore, Mr. Ross was not permitted to alter the format of his show in any way to assist in his campaign for office. Furthermore, in addition to avoiding discussion of his candidacy, Mr. Ross specifically avoided any solicitation of or response to any questions by listeners regarding his candidacy during the call-in portions of his show.
- b) Mr. Ross maintained a separate website for personal use. www.daveross.com. Entercom did not maintain nor have any control over this site. Since it was the understanding of KIRO that daveross.com contained references to Mr. Ross' campaign, Entercom requested that that any reference to KIRO be removed from the site. Furthermore, subsequent to his candidacy announcement, Mr. Ross was prohibited from mentioning daveross.com on the air.
- c) The complaint alleges that KIRO "allowed Dave Ross to appropriate KIRO-AM's trade dress." KIRO categorically denies giving Mr. Ross any permission to use any type of KIRO trade dress in connection with his campaign for office. Any such appropriation was done without the consent of KIRO or Entercom. When KIRO learned of the similarity between Mr. Ross' logo and the KIRO logo, it demanded that the logo be changed, which it is Entercom's understanding that it was.
- d) Other on-air personalities were also given strict directives prohibiting them from referring to Mr. Ross' campaign on the air.
- e) KIRO afforded Mr. Ross' primary opponents significant airtime to allow them to criticize KIRO for permitting Mr. Ross to stay on the air until July. No responses to this criticism were permitted. Mr. Ross' primary opponent, Alex Alban, was permitted to purchase a significant amount of airtime on KIRO during the primary campaign.

These directives were issued within three days of Mr. Ross' on-air announcement of May 20, 2004. To the best of the knowledge of Entercom and KIRO, there were no transgressions from these directives from either Mr. Ross or other on air personalities.

- (4) Mr. Ross formally filed for his candidacy for office on July 27, 2004.

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- (5) At no time did any of the CBS reports voiced by Dave Ross that aired on KIRO mention anything about Mr. Ross' candidacy or his campaign. In fact, he was forbidden from doing so by CBS. Although Mr. Ross continued to provide commentary for CBS after he left the air on July 23, it is believed that KIRO discontinued airing such commentaries until after the election.
- (6) Mr. Ross was interviewed by Allan Prell during the "Dave Ross Show" and on the Dori Monson Show during his campaign. The format of these interviews were undertaken as legitimate news events and undertaken in a format that would be used to interview any current candidate for office.
- (7) KIRO also interviewed all of Mr. Ross' potential Republican opponents in the primary (Diane Teibelius, Luke Esser, and Dave Reichert), together with Mr. Ross on September 1, 2005. On September 15, 2005, KIRO hosted a debate between Mr. Ross and his Republican opponent Mr. Reichert. And on October 19, 2005, Mr. Reichert was interviewed alone on KIRO. Entercom believes that there may have been other instances of opposing candidate appearances on KIRO during the primary and general election period but no longer has an written records available to confirm any details.

LEGAL DISCUSSION

The law governing this matter is well settled. The Act and the Commission's regulations clearly exempt the Dave Ross show from the Act through the "press exemption." Specifically, 2 U.S.C. § 431(9)(B)(i) states that the term "expenditure" does not include:

Any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

Further, the definition of "electioneering communication" does not include:

A communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee or candidate.

2 U.S.C. § 434(f)(3)(B)(i).

In determining whether the media exemption is applicable, the courts have held two questions to be relevant: (1) whether the entity is owned or operated by a political party, candidate or political committee and (2) whether the entity is operating within its "legitimate press function." *FEC v. Phillips Publishing Inc.*, 517 F.Supp. 1301, 1312-13 (D.D.C. 1981).

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Application of the two-part test to this matter demonstrates that Entercom was acting well within its legitimate press function. First, Entercom is a for-profit corporation that owns and operates commercial radio stations. Entercom is not controlled or owned by any political party, candidate or political committee. Second, Entercom was clearly acting within its "legitimate press function." KIRO is one of the leading news radio channels in the Pacific Northwest and has been on the air since 1927 (since 1974 as a news/information station). It is well regarded as the Pacific Northwest's heritage news and information radio station. Mr. Ross has been a talk show host for over seventeen years. Mr. Ross is one of the most highly regarded commentators in the United States and has been selected by CBS radio to provide national commentary in conjunction with Charles Osgood, a nationally renowned and respected news commentator. Entercom's decision to permit Mr. Ross to continue on the air was, in no way, related to his candidacy for federal office and was based solely on business considerations. To be sure, KIRO took extraordinary steps to ensure that it did not provide any type of forum for Mr. Ross to discuss his candidacy. Further, Mr. Ross took a leave of absence from his show to run for office more than three and a half months prior to the election. Although KIRO continued to call Dave Ross' air slot the "Dave Ross Show" this decision was not related to his campaign and was based solely upon business decisions in order to prevent dilution of its most coveted on-air product.

The Commission has recently considered a matter where a federal candidate was a guest host of various radio talk programs. In MUR 4689, the Commission found, by a 4-2 vote, no reason to believe that either the candidate or stations violated the Act even though the candidate had publicly vowed to run for office, had filed a statement of candidacy and begun raising campaign funds. The Commission determined that these facts did not prevent the candidate or the radio station from meeting the *Phillips* "legitimate press function" test:

...we are unconvinced that the identity or possible candidate status of the host-commentator is material to the outcome of this case. Even if we admit those considerations, however, the fact that Mr. Dornan was the guest host does not change the foregoing analysis, or the conclusion that the press entities were acting as such in presenting the programs in question.

MUR 4689, Statement of Reasons of Vice Hairman Darryl R. Wold, Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom, p. 3 (February 14, 2000).

Thus, the Commission held that it would not undertake any type of content analysis of programming by the media entity as part of its analysis of a press exemption case if the two prong *Phillips* test was satisfied.

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Statement of Reasons for Voting to Withdraw the Commission's Complaint in FEC v. Forbes, et al., Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom, p.9 (May 26, 1999).

Consistently, in MURs 5540 and 5545, three Commissioners recently concluded:

[I]t is not for this agency to determine what is a "legitimate news story" or who is a "responsible journalist." In reviewing the allegations of these complaints, the Commission's inquiry is limited to determining whether a "press entity charged with a violation is owned or controlled by a party or candidate and whether the distribution complained of was the type exempted by the statute. No inquiry may be addressed to sources of information, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable."

With respect to the KIRO website, although there were contemporaneous references to Mr. Ross' announcement at that time, KIRO officials ordered their removal immediately after these references were discovered. Even so, such references to Mr. Ross' announcement were legal and were also protected by the press exemption as the KIRO website was merely an extension of the radio station's regular media operations. Thus, the press exemption further extends to the station's website as well since it also disseminates news and commentary. In considering the press exemption's relation to the Internet, the Commission has consistently applied the same test as it has done for other traditional methods of communication. See e.g. FEC Advisory Opinion 2004-7. Accordingly, the Commission only need to conclude that KIRO is a legitimate press organization to determine that the content of its complementary website is also subject to the press exemption.

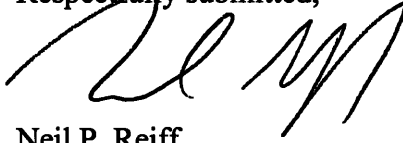
Thus, even if taken as true, the facts alleged by the complainant are not a violation of the Act since the actions of Entercom and KIRO are fully protected by the press exemption. By easily satisfying both prongs of the *Phillips* test, Entercom is operating fully within both its statutory and constitutional rights to permit Mr. Ross to remain on the air through July 23rd. Further, to the extent that they may have occurred, Entercom is protected by the press exemption from any incidental references to Mr. Ross' campaign either on its radio station or its accompanying website.

Although they were not required to do so, Entercom and KIRO, as a respected member of the media community, had taken extraordinary steps to ensure that it did not undertake any activities that could, in any way, support electioneering activities by Mr. Ross except for the airing of his announcement of his impending candidacy as well as a legitimate news interview of Mr. Ross—both legitimate news events. Thus, Mr. Ross' appearances on his daily radio show, including the KIRO website, are completely protected by the Act's press exemption and the First Amendment. Accordingly, such communications can not be said to be either "expenditures" or "electioneering communications" as defined by the Act, and the Commission should find no reason to

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believe that Entercom, LLC violated any portion of the Act and close the file in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'N. P. Reiff', written over the closing text.

Neil P. Reiff
Counsel to Entercom Seattle, LLC

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